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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 17-IB10**

**June 15, 2017**

**VIA U.S. MAIL & EMAIL**

Daniel J. Kramer  
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**RE: FOIA Petition Regarding Sussex County Council and the Planning and Zoning Commission of Sussex County**

Dear Mr. Kramer:

We write in response to your correspondence, dated July 18 2016, alleging that Sussex County Council and the Planning and Zoning Commission of Sussex County (collectively, “**Respondents**”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“**FOIA**”). Specifically, you allege that Respondents violated FOIA’s “open meeting” provisions by failing to provide public notice of several “focus group” meetings held on June 23 and 24, 2016 in connection with the county’s efforts to revise its comprehensive land use plan. We treat your correspondence as a petition under 29 *Del. C.* § 10005(e) for a determination as to whether a violation of FOIA has occurred. Pursuant to our routine process in responding to petitions for determination, we invited Respondents to submit a written response to the petition. We received their response on August 1, 2016. We subsequently requested and, on June 1, 2017, received supplemental information concerning Respondents’ respective roles in the comprehensive plan process. For the reasons discussed below, we conclude that Respondents did not violate FOIA as alleged in the petition.

**BACKGROUND**

Sussex County “government” is expressly defined as County Council, a five-member legislative body, but the concept also encompasses various administrative departments and advisory bodies, including the Planning and Zoning Commission.<sup>1</sup> The members of County

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<sup>1</sup> See 9 *Del. C.* §§ 6101(2), 7002.

Council serve four-year terms.<sup>2</sup> A quorum of County Council consists of three members.<sup>3</sup> County Council has ultimate responsibility for, among other things, approving a comprehensive land use plan for the county.<sup>4</sup>

The Planning and Zoning Commission is a seven-member advisory panel with five voting members appointed by County Council and two nonvoting *ex-officio* members.<sup>5</sup> A quorum consists of three voting members.<sup>6</sup> The commission acts as an advisory body to County Council on various land use and zoning matters. The commission is expressly tasked with preparing the county's comprehensive land use plan and making a recommendation to County Council regarding same.<sup>7</sup>

Delaware law requires all county governments to have comprehensive land use plans.<sup>8</sup> Counties are required to review and update their plans for State certification every 10 years.<sup>9</sup> Sussex County's plan was adopted and approved in 2008.<sup>10</sup> By law, County Council must approve a new or revised plan in 2018.

At some point in early 2015, County Council initiated a public procurement process to identify consultants to assist with planning-related matters. In September 2015, after a public meeting, County Council selected McCormick Taylor, Inc. ("**McCormick Taylor**"), a planning and engineering firm, to assist County Council in preparing a new comprehensive land use plan.<sup>11</sup>

On March 1, 2016, County Council held a public workshop, during which representatives of McCormick Taylor laid out a general timeline for the plan process.<sup>12</sup> The minutes of that meeting reflect a specific discussion of how the county and McCormick Taylor would be reaching out to and interfacing with members of the public through focus groups and public meetings.<sup>13</sup>

On June 23 and June 24, 2016, McCormick Taylor convened three focus groups to solicit input and gather information from various stakeholders in the community in advance of the

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<sup>2</sup> See 9 Del. C. § 7002(a).

<sup>3</sup> See 9 Del. C. § 7002(k)(3).

<sup>4</sup> See 9 Del. C. §§ 6807(a), 6953(a)(2).

<sup>5</sup> See 9 Del. C. § 6803(a).

<sup>6</sup> See 9 Del. C. § 6804(b).

<sup>7</sup> See 9 Del. C. § 6807(a).

<sup>8</sup> See 9 Del. C. § 6953(b).

<sup>9</sup> See 9 Del. C. § 6960(a).

<sup>10</sup> See <https://www.sussexcountycle.gov/comprehensive-plan> (last visited June 15, 2017).

<sup>11</sup> See County Council meeting minutes from September 29, 2015, at p.5, accessible at <https://www.sussexcountycle.gov/sites/default/files/minutes/092915.pdf> (last visited June 15, 2017).

<sup>12</sup> See County Council meeting minutes from March 1, 2016, at pp. 13-14, accessible at <https://www.sussexcountycle.gov/sites/default/files/minutes/030116.pdf> (last visited June 15, 2017).

<sup>13</sup> See *id.*, p. 14.

anticipated public meetings.<sup>14</sup> The record reflects that McCormick Taylor identified the stakeholders and invited them to the focus group events, without input or approval of County Council or the Planning and Zoning Commission.<sup>15</sup>

The record contains no evidence that any member of County Council attended the focus group events. One member of the Planning and Zoning Commission attended a focus group event on June 24, 2016.<sup>16</sup>

### **POSITIONS OF THE PARTIES**

As we interpret the petition, you maintain that Respondents violated FOIA because the June 2016 focus group events were not noticed or otherwise conducted in accordance with FOIA's open meeting requirements. You have not alleged, and the facts do not show, that a quorum of County Council or the Planning and Zoning Commission was present for any focus group event. As best we can ascertain, your argument presupposes that McCormick Taylor and/or the focus groups themselves are public bodies. Apparently, based on this fundamental assumption, you maintain that the focus group events were "meetings" as defined in 29 *Del. C.* § 10002(f) and were therefore subject to the notice and other requirements set forth in 29 *Del. C.* § 10004. We find no persuasive or other legal authority supporting your position.

Respondents point out that, in order for FOIA's public meeting requirements to apply to a particular gathering, the party holding the meeting must be a "public body" as defined in FOIA. Respondents argue that McCormick Taylor is not a public body. Respondents assert that McCormick Taylor is a private, third-party planning and engineering firm, not a "regulatory, administrative, advisory, executive, appointive or legislative body," as required by 29 *Del. C.* § 10002(h). Respondents further assert that McCormick Taylor was hired as a consultant and was not "established," "appointed," or "otherwise empowered" within the meaning of 29 *Del. C.* § 10002(h). According to Respondents, because McCormick Taylor is not a public body, it necessarily follows that the focus group events were not "meetings" covered by FOIA's open meeting requirements.

Respondents do not specifically address whether the focus groups were public bodies covered by FOIA.

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<sup>14</sup> See Letter from J. Everett Moore, Jr. Esq., dated August 1, 2016, at p. 2.

<sup>15</sup> See *id.* at p. 3.

<sup>16</sup> See *id.* The June 24, 2016 event was held at the offices of the Sussex Economic Development Action Committee, Inc. ("SEDAC"), a non-governmental entity that provides guidance to the county on ways to strengthen economic development efforts and bring jobs and prosperity to the community. According to Respondents, Commissioner Robert Wheatley attended the focus group event in his capacity as an *ex-officio* member of SEDAC, not as a member of the Planning and Zoning Commission. For present purposes, we assume, without deciding, that Commissioner Wheatley's attendance at the June 24, 2016 event would count toward the existence of a quorum of the Planning and Zoning Commission, notwithstanding his alleged status solely as an *ex-officio* member of SEDAC.

## RELEVANT STATUTES

FOIA begins with an express declaration of policy.<sup>17</sup> Section 10001 memorializes the General Assembly's intent that public business "be performed in an open and public manner" so that citizens can "observe the performance of public officials" and "monitor the decisions that are made by such officials in formulating and executing public policy."<sup>18</sup> Section 10001 instructs that FOIA's provisions are to be construed in light of these policies and consistent with the goal of furthering the accountability of government to the citizens of this State.<sup>19</sup>

Section 10004(a), with certain exceptions not relevant here, requires that every "meeting" of a "public body" be open to the public.<sup>20</sup> Section 10002(g) defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing."<sup>21</sup> Public bodies generally are required to provide advance notice of and agendas for all of their meetings.<sup>22</sup> Public bodies also must prepare and make available to the public minutes of their meetings.<sup>23</sup>

FOIA's open meeting requirements apply, on their face, only to the meetings of a "public body."<sup>24</sup> That phrase is specifically defined in Section 10002(h) as:

any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

- (1) Is supported in whole or in part by any public funds; or
- (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or

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<sup>17</sup> See 29 Del. C. § 10001.

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*

<sup>20</sup> 29 Del. C. § 10004(a).

<sup>21</sup> 29 Del. C. § 10002(g).

<sup>22</sup> See generally 29 Del. C. § 10004(e).

<sup>23</sup> See 29 Del. C. § 10004(f).

<sup>24</sup> See 29 Del. C. § 10004(a).

- (3) Is impliedly or specifically charged by any public official, body, or agency to advise or to make reports, investigations or recommendations.<sup>25</sup>

Though Section 10002(h) is expansive and covers a wide array of entities associated with the executive and legislative branches of state and local government, the statute has its limits. This matter tests the boundaries of Section 10002(h).

### DISCUSSION

The petition requires us to determine whether the June 2016 focus group events were “meetings” of a “public body,” as those terms are defined in FOIA. We answer this question in the negative.

As an initial matter, we note that Respondents are “public bodies” under Section 10002(h). County Council and the Planning and Zoning Commission. Both entities were “established” by acts of the General Assembly.<sup>26</sup> The focus group events, however, were not “meetings” of either County Council or the Planning and Zoning Commission.

Pursuant to Section 10002(g), there is no “meeting” absent a “formal or informal gathering of a quorum of the members of a[] public body.”<sup>27</sup> No member of County Council attended any of the focus group events. Only one member of the Planning and Zoning Commission participated, and only in one focus group. No focus group event, or all of them combined, contained a quorum of either body.

We turn to your suggestion that McCormick Taylor, and perhaps the focus groups themselves, are “public bodies” within the meaning of Section 10002(h). If so, the focus group events conceivably could constitute “meetings” under Section 10002(g). We conclude that neither McCormick Taylor, nor any focus group, meets the definition of a “public body” under Section 10002(h). It follows that the focus group events were not “meetings” as defined in FOIA.

McCormick Taylor is not a “public body” within the meaning of Section 10002(h). McCormick Taylor is a private entity that was engaged through a public procurement process to perform consulting services in connection with Sussex County’s formulation of a new comprehensive land use plan. McCormick Taylor is not a “regulatory, administrative, *advisory*, executive, appointive or legislative *body* [of county government].”<sup>28</sup> While McCormick Taylor’s engagement may be “advisory” in nature, the same holds true for most if not all contractual arrangements between a state or local governmental entity and an outside consultant. Further, McCormick Taylor lacks fundamental traits of a governmental “body,” as laid out in the text of Section 10002(h).

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<sup>25</sup> 29 Del. C. § 10002(h).

<sup>26</sup> See 9 Del. C. §§ 6101(2), 7002; 9 Del. C. §§ 6802, 6803.

<sup>27</sup> 29 Del. C. § 10002(g).

<sup>28</sup> 29 Del. C. § 10002(h) (emphasis added).

McCormick Taylor was not formed or empowered as contemplated in Section 10002(h). McCormick Taylor was not “established” or “appointed” by ordinance, resolution or other formal or informal action of County Council, the Planning and Zoning Commission or any other governmental entity or public official. McCormick Taylor is a corporation formed and run by private citizens.<sup>29</sup> The mere fact that McCormick Taylor may have been operating within the scope of its consulting engagement does not, without more, support a determination that the firm was “otherwise empowered” within the meaning of Section 10002(h). The definition of “public body” cast a wide net indeed, but we do not think it was intended to encompass every vendor or outside service provider based solely on the existence of a government contract.

The focus groups also do not constitute public bodies. This Office has on numerous occasions addressed whether informal working or similar groups can be “public bodies” within the meaning of Section 10002(h).<sup>30</sup> In *Del. Op. Att’y Gen.* 13-IB05, we answered that question in the affirmative and determined that a 24-member informal working group was a public body. That working group, advisory in nature, was formed by the Governor via letter invitation and tasked with making recommendations for changes to Delaware’s charter school laws.<sup>31</sup> The working group included a number of public officials, including members of the General Assembly and the State Board of Education, and various private stakeholder groups.<sup>32</sup> The working group members held monthly meetings for approximately six months, worked together collaboratively over that

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<sup>29</sup> See *Del. Op. Att’y Gen.* 15-IB05, 2015 WL 4850416, \*2 (July 31, 2015) (determining that a nonprofit senior center established by private citizens was not a public body because it was not formed in the manner specified in section 10002(h)).

<sup>30</sup> See, e.g., *Del. Op. Att’y Gen.* 13-IB05, 2013 WL 5615224, at \*4 (Oct. 1, 2013) (concluding that informal 24-member working group tasked with making recommendations for changes to Delaware’s charter school laws was a public body); *Del. Op. Att’y Gen.* 11-IB02, 2011 WL 1428936, at \*2 (Mar. 16, 2011) (determining that city did not violate FOIA where finance director invited “stakeholders” to participate in and convened focus groups to discuss city’s electric rate structure); *Del. Op. Att’y Gen.* 06-IB03, 2006 WL 1242013, at \*3 (Jan. 23, 2006) (2006) (“[W]e determine that the individuals who gathered [to discuss town charter amendments] at Councilman Chervenak’s office on November 28, 2005 — two current Council members, a State legislator, a former Cabinet Secretary, and former Town office-holders or candidates for office - as a group cannot be viewed as a single body subject to the open meeting law.”); *Del. Op. Att’y Gen.* 02-IB08, 2002 WL 970059, at \*5 (Apr. 4, 2002) (determining that informal meetings between County Attorney, the Chairman of the County Board of Elections and private consultant concerning redistricting were not “advisory group” as contemplated in FOIA); *Del. Op. Att’y Gen.* 01-IB15, 2001 WL 1593115, at \*5 (Oct. 23, 2001) (determining that meetings between County Administrator and his department heads and staff to develop a recommended budget did not constitute an “advisory board” to or “committee” of County Council); *Del. Op. Att’y Gen.* 99-IB15, 1999 WL 33100497, at \*2 (Dec. 9, 1999) (noting that “joint” meeting of public officials from different public bodies and representatives of an outside consultant can be a public body); *Del. Op. Att’y Gen.* 98-IB02, 1998 WL 148676, at \*3 (Jan. 30, 1998) (concluding that “ad hoc committee” of town council violated FOIA by conducting non-public workshops on the town’s local land use plan).

<sup>31</sup> See *Del. Op. Att’y Gen.* 13-IB05, 2013 WL 5615224, at \*2.

<sup>32</sup> See *id.*

period and ultimately issued recommendations that were incorporated into legislation.<sup>33</sup> The public and private constituent groups were fixed at the outset and did not change during the course of the working group's existence.<sup>34</sup>

The focus groups at issue here are distinguishable from the working group in *Del. Op. Att'y Gen.* 13-IB05. The focus groups were not formed, directly or indirectly, by a governmental entity or public official. The focus groups were created and run by McCormick Taylor, without input from or oversight by County Council or the Planning and Zoning Commission.<sup>35</sup> The focus groups contained no members of County Council and, at most, one member of the Planning and Zoning Commission.<sup>36</sup> In contrast to the working group in *Del. Op. Att'y Gen.* 13-IB05, the focus groups met only once, had little or no continuity of membership or interaction and were not impliedly or specifically charged with conducting investigations or making reports or recommendations. The focus groups were vehicles for McCormick Taylor to solicit and gather preliminary information from various stakeholders in advance of anticipated public meetings. They were not public bodies within the meaning of Section 10002(h).

We note there is no evidence to suggest that Respondents or McCormick Taylor used the focus groups to frustrate the goals of FOIA. To the contrary, County Council selected McCormick Taylor through a public process and convened a public workshop to explain the plan process to the public, including McCormick Taylor's role in that process. There will be one or more open meetings during which the Planning and Zoning Commission will consider publicly McCormick Taylor's plan-related recommendations, followed by one or more open meetings during which County Council will consider publicly the Planning and Zoning Commission's recommended plan. Members of the community will have adequate opportunities to observe the performance of their public officials.

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<sup>33</sup> *See id.*

<sup>34</sup> *See id.* at \*4.

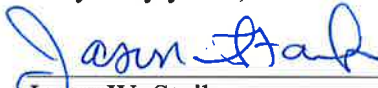
<sup>35</sup> *See Del. Op. Att'y Gen.* 02-IB08, 2002 WL 970059, at \*5 (Apr. 4, 2002) (determining that County Council did not "establish" a redistricting advisory group where County Council did not select its members or hold significant influence over the group's meetings).

<sup>36</sup> The mere presence of one county official from the Planning and Zoning Commission at one focus group meeting does not establish that any particular focus group was an ad hoc committee of County Council or the Planning and Zoning Commission. We have found the existence of ad hoc committees where public officials, invoking the quorum requirement, deliberately attempt to circumvent FOIA's open meeting requirements. *See, e.g., Del. Op. Att'y Gen.* 98-IB02, 1998 WL 148676, at \*3 ("Even if less than a quorum of the Town Council was present at the . . . workshops, we find that they constituted an ad hoc committee of the Council and therefore their meeting, without notice to the public, violated FOIA."). The facts here do not support such finding.

## CONCLUSION

For the reasons set forth above, we conclude that Respondents did not violate FOIA in connection with the June 2016 focus group events.

Very truly yours,



Jason W. Staib

Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: J. Everett Moore, Esq. (via email)